UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

In re:	:	Chapter 11
EASTERN LIVESTOCK CO., LLC,	:	Case No.: 10-93904-BHL-11
Debtor.	:	Hon. Basil H. Lorch III

RESPONSE TO TRUSTEE'S MOTION FOR EXPEDITED TELEPHONE CONFERENCE TO DISCUSS COMPLETION OF RULE 2004 EXAMINATIONS

Fifth Third Bank, N.A. ("Fifth Third") does not oppose the Motion for Expedited Telephone Conference to Discuss Completion of Rule 2004 Examinations [Doc. 1111] (the "Motion"), filed on March 26, 2012, by special counsel for the Trustee ("Special Counsel"). Fifth Third does, however, believe that some explanation is in order so that the Court may fully understand the context of—and the need for—the requested conference. Accordingly, Fifth Third states as follows:

1. On February 9, 2012, Special Counsel moved for Rule 2004 examinations of eleven current and former Fifth Third employees [Doc. 1022], and the Court granted that motion on February 15, 2012 [Doc. 1034]. Afterwards, Fifth Third agreed to produce a twelfth witness—a third party contractor who assisted Fifth Third in uncovering Eastern Livestock's fraudulent activity—and the Court issued a second order[1] reflecting that agreement as to the twelfth deponent on February 23, 2012 [Doc. 1062].

2. From February 23, 2012, to March 9, 2012—a period of just twelve business days—Fifth Third produced all twelve of the witnesses Special Counsel had identified. Upon

[1] The initial order was rescinded on February 17, 2012 [Doc. 1039].

completion of the final Rule 2004 examination on March 9, 2012, the scope of the Court's order authorizing Special Counsel to conduct Rule 2004 examinations had been exhausted.

3. Fed. R. Bankr. 2004 states that "***[o]n motion*** of any party in interest, the court may order the examination of any entity." (Emphasis added). Fed R. Civ. P. 30, made applicable to these proceedings by Fed. R. Bankr. P. 7030, also requires a party to move for certain discovery. Indeed, Fed. R. Civ. P. 30(a)(2)(A)(i) requires a party to obtain leave of court to conduct ***more than ten depositions***; Fed. R. Civ. P. 30(a)(2)(A)(ii) requires a party to obtain leave of court to depose a witness ***a second time***; and Fed R. Civ. P. 30(d)(1) requires a party, where no stipulation exists, to obtain leave of court to exceed the limit of ***one day of seven hours*** per deposition.[2]

4. Despite these myriad obligations to seek leave of court, Special Counsel has persisted in his effort to obtain eight more depositions without filing a motion. Specifically, he wants to depose five new witnesses[3]—but Special Counsel has not obtained leave of court to do so as is required by Fed. R. Bankr. P. 2004 and Fed. R. Civ. P. 30(a)(2)(A)(i). And he wants to re-depose three witnesses, two of whom (Patty Voss and Anne Kelly) have already been deposed for a full seven hours—but Special Counsel has not obtained leave of court to do so as is required by Fed. R. Civ. P. 30(a)(2)(A)(ii) and 30(d)(1).

5. Fifth Third submits that Special Counsel ought not be permitted to take the additional examinations. Rule 2004 examinations "are not an unfettered and totally unqualified tool for 'fishing' for adverse information." *In re Strecker*, 251 B.R. 878, 880 (Bankr. D. Colo.

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[2] The Court's Order Granting in Part and Continuing in Part Fifth Third's Motion to Limit Discovery or, Alternatively, for a Protective Order [Doc. 1051], entered on February 21, 2012, expressly adopted the limitation set forth in Fed. R. Civ. P. 30(d), stating that Special Counsel "shall be permitted one day of seven hours to complete the deposition of each witness he deposes."

[3] Special Counsel has added two additional witnesses since filing his Preliminary Report on March 16, 2012 [Doc. 1098], in which he made no mention of deposing Bill Hummel or a member of Fifth Third's IT department.

2000). Indeed, they "should not be so broad as to be more disruptive and costly to the party sought to be examined than beneficial to the party seeking discovery." *In re Deshetler*, 453 B.R. 295, 302 (Bankr. S.D. Ohio. 2011); *see In re Underwood*, 56 B.R. 635, 644-45 (Bankr. S.D. Ohio 2011) ("The proper scope of the examination is further limited by consideration of the costs and impact of the examination on the creditor to be examined.").

6. In one case, *In re Texaco, Inc.*, 79 B.R. 551 (Bankr. S.D.N.Y. 1987)—at the time the largest bankruptcy filing in U.S. history with assets listed in excess of $18.3 billion—a party requested Rule 2004 examinations of eight of the debtor's employees. *Id.* at 555-56. The court, however, found that the proposed examination of eight witnesses was "overly burdensome," "disruptive," and "vexatious," and limited the Trustee to only ***three*** Rule 2004 examinations. *Id.* at 556. In this case, Special Counsel has already conducted ***twelve*** Rule 2004 examinations of Fifth Third witnesses, and the discovery that he proposes would raise that number to ***twenty***—twice the number of depositions afforded for the full litigation of a case by Fed. R. Civ. P. 30.

7. In addition, Special Counsel informed the Court in his March 16, 2012, Preliminary Report that his extensive investigation had already enabled him "to form a good understanding of ELC's banking practices during 2009 and 2010;" that Special Counsel's investigation had already "detailed a clear picture of the additional lending that ELC was requesting, the credit extensions it received, and the maturity of its revolving line of credit during September 2010;" and that he had already "***determined how and when Fifth Third began suspecting that ELC was conducting a complex check kite operation and at the same time misrepresenting accounts receivable and cattle inventories***." (Doc. 1098, ¶15 (emphasis added)).

8. Having already deposed twelve witnesses, reviewed more than 30,000 documents provided by Fifth Third, and reached so many material conclusions, Special Counsel's proposed discovery—including repeated depositions of certain witnesses, extensions of the seven-hour time limit imposed by the Federal Rules and this Court's order, and the addition of five new witnesses to raise the total deposition count to twenty—is not justified under Rule 2004. *See In re Ricker*, 2011 Bankr. LEXIS 5255, at *3 (Bankr. N.D. Ind. Nov. 1, 2011) (Rule 2004 examinations are not "vehicles by which parties can attempt to do a substantial portion of their discovery before initiating litigation."); *In re Underwood*, 56 B.R. at 645-46 (denying Rule 2004 examinations requests that "cross[ed] the line into the type of full scale investigation of a non-debtor's private affairs."); *In re Michalski*, 449 B.R. 273, 282 (Bankr. N.D. Ohio 2011) ("Inquiries that seek far-reaching information on policies and procedures of general application in the creditor's operation will require a correspondingly higher showing of good cause because they are inherently more intrusive and present a greater potential for abuse."); *In re Countrywide Home Loans*, 384 B.R. 373, 393-94 (Bankr. W.D.Pa. 2008) ("[W]hile Rule 2004 allows a fishing expedition to some extent, it may not be used as a device to launch into a wholesale investigation of a non-debtor's private business affairs."); *In re Perrotta*, 378 B.R. 27, 29 (Bankr. D.N.H. 2007) (denying trustee's motion for 2004 examinations as overly burdensome); *In re Texaco, Inc.*, 79 B.R. 551, 553 (Bankr. S.D.N.Y. 1987) (A 2004 "examination should not encompass matters that will be unduly burdensome to the [examinee] and duplicative of previously furnished information."); *In re GHR Energy Corp.*, 35 B.R. 534, 537 (Bankr. D. Mass. 1983) (limiting the scope of Rule 2004 examinations).

Respectfully submitted,

/s/ Randall D. LaTour
Randall D. LaTour (*admitted pro hac vice*)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
Columbus, OH 43215
Telephone: (614) 464-8290
Facsimile: (614) 719-4821
Email: rdlatour@vorys.com

Kent A. Britt (*admitted pro hac vice*)
Vorys, Sater, Seymour and Pease LLP
221 East Fourth Street
Suite 2000, Atrium Two
Cincinnati, Ohio 45202
Telephone: (513) 723-4488
Facsimile: (513) 852-7818
Email: kabritt@vorys.com

Attorneys for Fifth Third Bank

CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2012, a copy of the foregoing *Response to Trustee's Motion for Expedited Telephone Conference to Discuss Completion of Rule 2004 Examinations* was filed and served electronically through the Court's CM/ECF System to the following parties who are listed on the Court's Electronic Mail Notice List:

- David L. Abt davidabt@mwt.net
- Amelia Martin Adams aadams@dlgfirm.com
- John W Ames james@bgdlegal.com, smays@bgdlegal.com;tmills@bgdlegal.com
- Jerald I. Ancel jancel@taftlaw.com, ecfclerk@taftlaw.com;krussell@taftlaw.com
- Christopher E. Baker cbaker@hklawfirm.com, thignight@hklawfirm.com
- T. Kent Barber kbarber@dlgfirm.com, dlgecf@dlgfirm.com;dlgecfs@gmail.com
- Robert A. Bell rabell@vorys.com, dmchilelli@vorys.com
- C. R. Bowles cbowles@bgdlegal.com, smays@bgdlegal.com;cjenkins@bgdlegal.com
- Steven A. Brehm sbrehm@bgdlegal.com, bbaumgardner@bgdlegal.com;smays@bgdlegal.com
- Kent A Britt kabritt@vorys.com, cbkappes@vorys.com
- Lisa Koch Bryant courtmail@fbhlaw.net
- James M. Carr jim.carr@faegrebd.com, sarah.herendeen@faegrebd.com;patricia.moffit@faegrebd.com
- John R. Carr jrciii@acs-law.com, sfinnerty@acs-law.com

- Deborah Caruso dcaruso@daleeke.com, mthomas@daleeke.com
- Bret S. Clement bclement@acs-law.com, sfinnerty@acs-law.com
- Jason W. Cottrell jwc@stuartlaw.com
- Kirk Crutcher kcrutcher@mcs-law.com, jparsons@mcs-law.com;cmarshall@mcs-law.com
- Jack S Dawson jdawson@millerdollarhide.com, jowens@millerdollarhide.com;receptionist@millerdollarhide.com
- Dustin R. DeNeal dustin.deneal@faegrebd.com, patricia.moffit@faegrebd.com;sarah.herendeen@faegrebd.com
- Laura Day DelCotto ldelcotto@dlgfirm.com, dlgecf@dlgfirm.com;dlgecfs@gmail.com
- David Alan Domina dad@dominalaw.com, KKW@dominalaw.com;efiling@dominalaw.com
- Daniel J. Donnellon ddonnellon@ficlaw.com, knorwick@ficlaw.com
- Trevor L. Earl tearl@rwsvlaw.com
- Shawna M Eikenberry shawna.eikenberry@faegrebd.com, sarah.herendeen@faegrebd.com
- Jeffrey R. Erler jeffe@bellnunnally.com
- Robert H. Foree robertforee@bellsouth.net
- Sandra D. Freeburger sfreeburger@dsf-atty.com, smattingly@dsf-atty.com
- Peter M Gannott pgannott@gannottlaw.com, ahanover@gannottlaw.com;mkeane@gannottlaw.com
- Melissa S. Giberson msgiberson@vorys.com
- Jeffrey J. Graham jgraham@taftlaw.com, ECFClerk@taftlaw.com;krussell@taftlaw.com;aolave@taftlaw.com
- Terry E. Hall terry.hall@faegrebd.com, sharon.korn@faegrebd.com;sarah.herendeen@faegrebd.com
- John David Hoover jdhoover@hooverhull.com
- John Huffaker john.huffaker@sprouselaw.com, lynn.acton@sprouselaw.com;rhonda.rogers@sprouselaw.com
- Jeffrey L Hunter jeff.hunter@usdoj.gov, USAINS.ECFBankruptcy@usdoj.gov
- Jay Jaffe jay.jaffe@faegrebd.com, sarah.herendeen@faegrebd.com
- James Bryan Johnston bjtexas59@hotmail.com, bryan@ebs-law.net
- Todd J. Johnston tjohnston@mcjllp.com
- Jill Zengler Julian Jill.Julian@usdoj.gov
- Edward M King tking@fbtlaw.com, dgioffre@fbtlaw.com
- James A. Knauer jak@kgrlaw.com, hns@kgrlaw.com
- James A. Knauer jak@kgrlaw.com, hns@kgrlaw.com
- Erick P Knoblock eknoblock@daleeke.com
- Theodore A Konstantinopoulos ndohbky@jbandr.com
- Randall D. LaTour RDLatour@vorys.com, khedwards@vorys.com;bjtobin@vorys.com
- David A. Laird david.laird@moyewhite.com, lisa.oliver@moyewhite.com;deanne.stoneking@moyewhite.com

- David L. LeBas dlebas@namanhowell.com, koswald@namanhowell.com
- Elliott D. Levin robin@rubin-levin.net, edl@trustesolutions.com;edl@trustesolutions.net
- Elliott D. Levin edl@rubin-levin.net, atty_edl@trustesolutions.com
- Kim Martin Lewis kim.lewis@dinslaw.com, lisa.geeding@dinslaw.com;patrick.burns@dinslaw.com
- James B. Lind jblind@vorys.com
- Karen L. Lobring lobring@msn.com
- John Hunt Lovell john@lovell-law.net, sabrina@lovell-law.net;shannon@lovell-law.net;paula@lovell-law.net
- Harmony A Mappes harmony.mappes@faegrebd.com, judith.gilliam@faegrebd.com;sarah.herendeen@faegrebd.com
- John Frederick Massouh john.massouh@sprouselaw.com
- Michael W. McClain mike@kentuckytrial.com, laura@kentuckytrial.com
- Kelly Greene McConnell lisahughes@givenspursley.com
- James Edwin McGhee mcghee@derbycitylaw.com, belliott@derbycitylaw.com;patenaude@derbycitylaw.com
- William Robert Meyer rmeyer@stites.com
- Sarah Stites Millspaugh smillspaugh@hopperblackwell.com, mroth@hopperblackwell.com
- Christie A. Moore cm@gdm.com, ljs2@gdm.com
- Allen Morris amorris@stites.com, dgoodman@stites.com
- Judy Hamilton Morse judy.morse@crowedunlevy.com, ecf@crowedunlevy.com;donna.hinkle@crowedunlevy.com;karol.brown@crowedunlevy.com
- Walter Scott Newbern wsnewbern@msn.com
- Shiv Ghuman O'Neill shiv.oneill@faegrebd.com
- Matthew J. Ochs kim.maynes@moyewhite.com
- Michael Wayne Oyler moyler@rwsvlaw.com
- Ross A. Plourde ross.plourde@mcafeetaft.com, erin.clogston@mcafeetaft.com
- Wendy W Ponader wendy.ponader@faegrebd.com, sarah.herendeen@faegrebd.com
- Timothy T. Pridmore tpridmore@mcjllp.com, lskibell@mcjllp.com
- Anthony G. Raluy traluy@fbhlaw.net
- Jeffrey E. Ramsey jramsey@hopperblackwell.com, mhaught@hopperblackwell.com
- Eric C Redman ksmith@redmanludwig.com, kzwickel@redmanludwig.com;myecfmailrl@gmail.com
- Eric W. Richardson ewrichardson@vorys.com, bjtobin@vorys.com
- Joe T. Roberts jratty@windstream.net
- Susan K. Roberts skr@stuartlaw.com, lbt@stuartlaw.com
- Mark A. Robinson mrobinson@vhrlaw.com, dalbers@vhrlaw.com
- Jeremy S Rogers Jeremy.Rogers@dinslaw.com, joyce.jenkins@dinslaw.com
- John M. Rogers johnr@rubin-levin.net, susan@rubin-levin.net
- Joseph H Rogers jrogers@millerdollarhide.com, cdow@millerdollarhide.com
- James E Rossow jim@rubin-levin.net, susan@rubin-

levin.net;ATTY_JER@trustesolutions.com

- Thomas C Scherer mmcclain@bgdlegal.com
- Ivana B. Shallcross ishallcross@bgdlegal.com, smays@bgdlegal.com;tmills@bgdlegal.com
- James E. Smith jsmith@smithakins.com, legalassistant@smithakins.com
- William E Smith wsmith@k-glaw.com, pballard@k-glaw.com
- Robert K Stanley robert.stanley@FaegreBD.com
- Joshua N. Stine kabritt@vorys.com
- Andrew D Stosberg astosberg@lloydmc.com
- Meredith R. Thomas mthomas@daleeke.com
- John M. Thompson john.thompson@crowedunlevy.com, jody.moore@crowedunlevy.com,donna.hinkle@crowedunlevy.com
- Kevin M. Toner kevin.toner@faegrebd.com, judy.ferber@faegrebd.com;crystal.hansen@faegrebd.com
- Christopher M. Trapp ctrapp@rubin-levin.net
- U.S. Trustee ustpregion10.in.ecf@usdoj.gov
- Andrea L Wasson andrea@wassonthornhill.com
- Stephen A. Weigand sweigand@ficlaw.com
- Charles R. Wharton Charles.R.Wharton@usdoj.gov, Charles.R.Wharton@usdoj.gov
- Sean T. White swhite@hooverhull.com, vwilliams@hooverhull.com
- Jessica E. Yates jyates@swlaw.com, jmilelli@swlaw.com;docket_den@swlaw.com;mmccleery@swlaw.com
- James T Young james@rubin-levin.net, lemerson@rubin-levin.net;carmen@rubin-levin.net

/s/ Randall D. LaTour
Randall D. LaTour